

In the Supreme Court of the United States**OCTOBER TERM, 1976****No. 75-1576****LOUIS MARTIN RADETSKY, A/K/A L. M. RADETSKY,
PETITIONER****v.****UNITED STATES OF AMERICA****ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT****BRIEF FOR THE UNITED STATES IN OPPOSITION****OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-55a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1976. The petition for a writ of certiorari was filed on April 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment satisfied the specificity requirement of the Fifth Amendment.
2. Whether petitioner was prejudiced by the submission of the bill of particulars to the jury.

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PETITIONER****v.****UNITED STATES OF AMERICA****ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT****BRIEF FOR THE UNITED STATES IN OPPOSITION****ROBERT H. BORK,
*Solicitor General,*****RICHARD L. THORNBURGH,
*Assistant Attorney General,*****JEROME M. FEIT,
RICHARD R. ROMERO,
*Attorneys,
Department of Justice,
Washington, D.C. 20530.***

3. Whether petitioner's privilege against self-incrimination was violated by the admission into evidence of financial and patient records belonging to a professional medical corporation, whose stockholders were petitioner and his wife.

4. Whether petitioner was prejudiced by the government's admonition to grand jury witnesses that they not discuss their testimony without court approval and by the trial court's denial of a request for pretrial inspection of transcripts of grand jury testimony.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner, a licensed osteopath, was convicted on several counts of submitting false medicare claims, in violation of 18 U.S.C. 1001.¹ He was fined \$1,500 on each count. The court of appeals affirmed in a comprehensive opinion (Pet. App. 1a-55a).

The evidence showed that petitioner requested payments from the medicare program for medical services

¹Petitioner was indicted on 41 counts of submitting, and on one count of conspiring to submit, false medicare claims. On the government's motion three of the substantive counts were dismissed prior to trial, and the district court later dismissed the conspiracy count. The jury found petitioner guilty on 32 of the 41 substantive counts. The court of appeals, one judge dissenting, reversed his convictions on 26 counts due to insufficient evidence that petitioner's false statements, in the medicare claims which formed the basis of those 26 counts, were material as required by 18 U.S.C. 1001 (Pet. App. 33a-40a). Petitioner's convictions on the remaining six counts were affirmed, with a different judge dissenting (Pet. App. 1a-55a).

Richard Griffin, Gwendolyn Alice Green, and Carolyn Largent were listed as unindicted co-conspirators. Marie Standefer was charged with conspiring with petitioner to submit false medicare claims, but she pleaded guilty to making false statements in connection with medicare claims, in violation of 42 U.S.C. 408 (a misdemeanor), and the conspiracy charge was dismissed.

he had not rendered, misrepresented medical procedures and services, charged the medicare program higher rates than his customary ones for services that he did perform, and inflated the amounts paid by his medicare patients.²

ARGUMENT

1. Each of the six substantive counts on which petitioner has been convicted was based on a particular request for medicare payment filed by petitioner.³ The counts identified the falsehoods in the request as "services" or "charges" or "amount paid" or a combination thereof. Petitioner contends (Pet. 10-12) that these counts did not satisfy the Fifth Amendment's requirement of specificity because each request for payment contained numerous dates when services allegedly were rendered and a large number of specific services and charges, thereby in his view making it "impossible to determine which of the numerous items [dates, services, charges] listed on each request for payment form constituted the basis for the grand jury's indictment" (Pet. 11).

This claim involves only the application of the principles of *Russell v. United States*, 369 U.S. 749, to the particular circumstances of this case, and it accordingly does not warrant further review. In any event, the court of appeals gave careful attention to this claim and correctly rejected it. The indictment set forth in detail the unlawful scheme that petitioner employed to defraud the

²Under the medicare program patients are supposed to pay 20% of the cost of the medical services they receive. Petitioner was able to obtain 100% payment from medicare, however, by charging medicare inflated prices or by charging for services not rendered. To conceal his scheme, petitioner would represent that the patient had either paid nothing or had paid only 20% of the "unpadded" bill.

³See counts 7, 8, 11, 15, 28, 36 (Pet. App. 43a-45a).

medicare program. Each of the six counts was based on a particular request for payment for medical services rendered, each identified the request by date, the time period covered by the request, and the name of the patient, and each designated the source of the material facts (*e.g.*, services, charges, amounts paid, dates) that were challenged as false. This form of indictment is expressly sanctioned by Rule 7(c), Fed. R. Crim. P., which provides that “[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means.” And, as the court of appeals correctly concluded (Pet. App. 12a), the indictment satisfied all constitutional requirements as well:

The indictment set forth the essential facts and the nature of the offense charged, and further details fall in the category of evidence on which the case would rest, which the indictment is not obliged to state. See *Mims v. United States*, 332 F. 2d 944, 946 (10th Cir.); *Flying Eagle Publications, Inc. v. United States*, 273 F. 2d 799, 802 (1st Cir.). And we feel this is not a case where the grand jury may have had a concept of the scheme essentially different from that relied on by the Government before the trial jury, as in *United States v. Curtis*, 506 F. 2d 985, 989 (10th Cir.). See also *Stirone v. United States*, 361 U.S. 212, 217-18.⁴

⁴The bill of particulars, as to five of the six counts (7, 8, 11, 15, 28), confirmed what would appear to be the plain import of the indictment, *i.e.*, that all of the services, charges, amounts paid, and the two specific dates of house and office calls were false. As to Count 36, the bill of particulars stated that only the first five charges were false in the relevant request for medicare payment submitted by petitioner. In narrowing the scope of the allegations in this manner, the bill of particulars was not being used to cure any defect in the count in contravention of the principles enunciated in *Russell v. United States, supra*, for, given the overall specificity of the indictment, it did not represent the sort of “guess as to what was in the minds of the grand jury” that *Russell* condemned (369 U.S. at 770).

2. Petitioner also asserts (Pet. 12-15) that it was error for the trial court to submit the bill of particulars to the jurors. The court of appeals agreed with petitioner (Pet. App. 14a-15a),⁵ but it refused to reverse his convictions on this ground because it found the error harmless. This factual conclusion warrants no further review.

In any event, petitioner’s attempt to show prejudice is premised on his argument that the indictment was defective and that the bill of particulars was used to cure it; but, as we have just shown, the indictment had no defects to cure. Moreover, a comparison of the indictment with the bill of particulars shows that the bill did not elaborate but merely rephrased the description of the offenses in the six counts on which petitioner has been convicted.⁶ In short, the bill of particulars added nothing of significance to the indictment and the documentary evidence, all of which was properly submitted to the jury. Since the trial court adequately instructed the jury that neither the indictment nor the bill of particulars was evidence and that the bill merely specified the allegations in the indictment (XVII Tr. 1271-1272, 1275), submission of the bill of particulars to the jury did not rise to the level of prejudicial error, if error it was.⁷

⁵Judge Barrett evidently found no impropriety in the submission (Pet. App. 52a).

⁶We are lodging a copy of the bill of particulars with the Clerk of this Court.

⁷Contrary to petitioner’s claim (Pet. 12-13), the present case does not conflict with *Pipkin v. United States*, 243 F. 2d 491, 494 (C.A. 5), where the bill of particulars never went to the jury and the court accordingly did not have occasion to consider whether, if it had, prejudicial error would have resulted. Similarly, in *United States v. Borelli*, 336 F. 2d 376, 393 (C.A. 2), also relied upon by petitioner (Pet. 13), the court reversed on an unrelated ground and then observed, without deciding whether it had amounted to prejudicial error, that the bill of particulars should not have been submitted to the jurors since they had not asked for it.

3. Petitioner claims (Pet. 15-16) that his privilege against self-incrimination was violated by the admission into evidence of medical and financial records⁸ belonging to the South Denver Clinic, a professional corporation organized in 1969 under Colorado law. Petitioner acknowledged at trial that the records belonged to the clinic and were merely in his custody and control (XIII Tr. 929). The clinic, whose only stockholders were petitioner and his wife, employed two doctors—petitioner and Dr. Griffin—and three clerical or office employees (XIII Tr. 880, 928). According to petitioner's testimony, the patients were considered to be patients of the individual doctors rather than of the clinic in general, but petitioner acknowledged that payments received from Dr. Griffin's patients, or from medicare on these patients' behalf, went to the clinic (XIII Tr. 931-932). In these circumstances the court of appeals correctly ruled that the clinic's records were not petitioner's private property and could not be kept out of evidence by a claim under the self-incrimination clause (Pet. App. 24a; footnote omitted):

The professional corporation was organized as an independent institutional entity for the continuing conduct of the medical practice of the clinic. *Bellis v. United States*, 417 U.S. 85, 95-97. The records were not treated as being held by the doctors individually but were held in a representative capacity for the clinic. *Id.* at 97; *Matter of Berry*, 521 F. 2d 179, 183 (10th Cir.), cert. denied, 44 U.S.L.W. 3264 (11/4/75). They were not possessed as private

⁸The records consisted of patients' charts; blue slips showing the test or service rendered and the charge for it; punched business machine accounting cards showing dates of visits by patients, the attending doctor, the service, charges, and credits; and "day sheets" listing all patients patronizing the clinic and the charges made.

property which the Fifth Amendment protects. *Matter of Berry*, *supra* at 183.

See also *In the Matter of Grand Jury Impaneled January 21, 1975*, 529 F. 2d 543 (C.A. 3), certiorari denied, No. 75-1215, May 24, 1976.⁹

4. Petitioner also asserts (Pet. 16-17) that the government's admonition to the grand jury witnesses that they not discuss their testimony without court approval (a restriction not imposed on grand jury witnesses by Rule 6(e), Fed. R. Crim. P.) had the effect of depriving him of a fair trial by interfering with the preparation of his defense. He contends that the unfairness was exacerbated because he also was denied pretrial inspection of transcripts of the witnesses' grand jury testimony.¹⁰ But the transcript of each witness's grand jury testimony was given to petitioner before the direct examination of the witness at trial (V Tr. 83-84; VII Tr. 253; VIII Tr. 342-343; XI Tr. 660-661, 673), and petitioner does not show how in fact the government's admonition or his inability to see the transcripts earlier worked to prejudice him in preparing his defense. The court of appeals thus properly rejected this claim (Pet. App. 28a; footnote omitted):

⁹Even if petitioner were correct that the records were his private property, it would appear under *Fisher v. United States*, No. 74-18, decided April 21, 1976, that his privilege against self-incrimination would not be available to resist production of the records in response to subpoena; by the same token the privilege was not violated by introduction of the records into evidence.

¹⁰The court of appeals concluded that the admonition to the grand jury witnesses was improper and noted that the practice of giving such admonitions has been discontinued in the District of Colorado (Pet. App. 27a and n. 16). To our knowledge no such practice is followed in any other district, and accordingly there would appear to be no need for this Court to consider the question of the propriety of such admonitions.

No reference is made to any specific prejudice to [petitioner] from not having the transcripts earlier. Regardless of whether the Jencks Act provisions or the particularized need standard applies, see United States v. Quintana, 457 F. 2d 874, 878 (10th Cir.), cert. denied, 409 U.S. 877; United States v. Tager, 481 F. 2d 97, 100 (10th Cir.), cert. denied, 415 U.S. 914 (1974), we are satisfied that any error was harmless and not prejudicial. [Petitioner's] position remains in effect a general claim that it was error to deny him the transcripts because they were needed for the defense, and this is not enough. United States v. Addington, 471 F. 2d 560, 569 (10th Cir.).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
RICHARD R. ROMERO,
Attorneys.

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